Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-78 (2)

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1986

ETHEL A. ROBERTS,
Personal Representative of the Estate
of Arthur N. Roberts, Deceased,

Petitioner,

v.

JAMES SPALDING, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

KENNETH O. EIKENBERRY
Attorney General

TIMOTHY R. MALONE
Assistant Attorney General

DAVID E. WALSH
Deputy Attorney General
Attorneys for Respondents.

Temple of Justice
Olympia, Washington 98504
(206) 753-6983
October , 1986

STATE PRINTING PLANT OLYMPIA, WASHINGTON

20 pp

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
Introduction: Nature of Petitioners Claim	1
Counterstatement of the Facts	2
REASONS WHY THE PETITION SHOULD BE DENIED	7
I The Ninth Circuit Court of Appeals was correct in determining that the state regulations in question did not create independent, individual, liberty interests or rights	9
II The court should not expand the standards in *Olim* and *Hewitt* to create the type of right sought to be established	12
III There is no need to accept review of this case in order to "clarify" *Estelle v. Gamble*	14
CONCLUSION	16
APPENDIX A	A-1

TABLE OF AUTHORITIES

CASES: *Page*

Baumann v. Arizona Dept. of Corrections, 754-F.2d 841, 844 (9th Cir. 1985) 12

Connecticut Board of Pardons v. Dumschat, 452, U.S. 458 (1981) 9, 11

Daniels v. Williams, 474 U.S. ____ (1986) Slip Opinion 54 USLW 4095 ..... 13, 14

Davidson v. Cannon, 474 U.S. ____ (1986) Slip Opinion 54 USLW 4090 ..... 13, 15

Estelle v. Gamble, 429 U.S. 97 (1976) 2, 8, 14

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) 11, 12

Hewitt v. Helms, 459 U.S. 460 (1983) 1, 8, 10, 12

Hoptowit v. Ray, 682 F.2d 1237, (9th Cir. 1980) 3, 14

McFarland v. Cassady, 779 F.2d 1426, (9th Cir. 1986). 12

Meachum v. Fano, 427 U.S. 215 (1976) 9, 11, 12

Montanye v. Haymes, 427 U.S. 236 (1976) 9, 11, 12

Olim v. Wakinekona, 461 U.S. 238 (1983) 1, 8, 10, 12

Parat v. Taylor, 451 U.S. 527 (1981) 13

Spaziano v. Florida, 468 U.S. 447 (1984) 14, 15

Sproytte v. Walters, 753 F.2d 498, (6th Cir. 1985) 12

Vitek v. Jones, 445 U.S. 480 (1980) 9, 11

Whitley v. Albers, 475 U.S. ____ (1986) Slip Opinion 54 USLW 4236 ..... 14, 15

FEDERAL STATUTES:

42 U.S.C. § 1983 2

Eighth Amendment, United States Constitution 8

Fourteenth Amendment, United States Constitution ... 7

STATE STATUTES:

Washington Administrative Code 275-91-050 6

No. 87-78

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

ETHEL A. ROBERTS,
Personal Representative of the Estate
of Arthur N. Roberts, Deceased,

Petitioner,

v.

JAMES SPALDING, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

INTRODUCTION: NATURE OF PETITIONERS CLAIM

The principal issue in this Petition for Certiorari is whether two state administrative regulations (WAC 275-91-050, WAC 275-91-070 Appendix A) regarding medical care at the state prisons create an enforceable individual liberty interest under the standards set forth in *Olim v. Wakinekona*, 461 U.S. 238 (1983) (hereinafter referred to as *Olim*), and *Hewitt v. Helms*, 459 U.S. 460 (1983), (hereinafter referred to as *Hewitt).*

The Petitioner contends that both the District Court and the Ninth Circuit Court of Appeals erroneously failed to recognize a state-created right "to access to meaningful medical care" arising from those regulations. The Ninth Circuit determined that the regulations did not create an enforceable liberty interest. One regulation, WAC 275-91-070, authorized only the possibility of supplemental medical care, over and above that which was provided by the prison. It did not create a right to or expectation of supplemental care, nor did it limit or restrict state decision making in a manner that would create enforceable individual rights. The other regulation, WAC 275-91-050, related to the supervision of "allied health professionals." It likewise did not create individual rights. The Petitioner claims that the Ninth Circuit was incorrect and suggests that it is necessary for this Court to clarify *Estelle v. Gamble*, 429 U.S. 97 (1976) (hereinafter referred to as *Estelle*), in the light of the facts in this case.

COUNTERSTATEMENT OF THE FACTS

Petitioner's argumentative recitation of selected evidence presented at trial distracts from the principal issue before this Court and paints a misleading picture of both the events prior to Mr. Robert's death, and the level of medical service actually provided on a continuous basis at the institution. The following information therefore is submitted to fill in the gaps in Petitioner's presentation and to clarify certain incorrect conclusionary statements.

The underlying case was brought under 42 U.S.C. § 1983. Petitioner challenged the adequacy of medical treatment afforded to Mr. Roberts prior to his death at the Washington State Penitentiary on December 21, 1979. It was alleged that the medical care violated his Eighth Amendment rights, denied him equal protection of the law, and deprived him of a state-created liberty interest without due process. The due process claim was based on the theory that the administrative regulations created a

right which could not be taken away without a violation of due process requirements. Petitioner also brought an action under state law for negligence and medical malpractice. These state claims were dropped the day before trial.

The case went to trial only on the issue of whether there was a violation of Mr. Robert's Eighth Amendment rights. The District Court Judge refused to submit the Equal Protection and Due Process claims to the jury.[1] The jury returned a verdict in favor of the defendants on the Eighth Amendment claim.

Petitioner appealed the District Court refusal to instruct on the Due Process and Equal Protection claims to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the District Court ruling that the regulations in question did not establish the type of individual rights or interest necessary to support a due process claim.[2] This Petition asks this Court to recognize the alleged state created rights.

The trial of the Eighth Amendment claim focused on the medical treatment provided to Mr. Roberts. The evidence indicated that Mr. Roberts had been a frequent visitor to the medical facility during 1979. He had been seen forty-six times between March and October for various conditions unrelated to the chest pain. He was seen at the clinic on November 29, 1986, approximately two weeks prior to the first incident referred to by Petitioners, complaining of chest pains and sinus congestion. He was given a complete exam by a nurse practitioner including chest

---

[1]The Court also refused a request for directed verdict in favor of Petitioner based on the Ninth Circuit determination in *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1980). Petitioner contended that it was unnecessary to establish an individual Eighth Amendment violation in order to recover damages since the Ninth Circuit had found a class based institutional violation during the same time period.

[2]The Ninth Circuit affirmed the District Court rejection of the alleged Equal Protection claim. The opinion noted that Plaintiff had been unable to establish that the regulations themselves were constitutionally deficient. The District Court refusal to direct a verdict based on *Hoptowit v. Ray, supra*, was also affirmed.

X-rays and an EKG. All tests indicated that he had no life threatening heart disease.

He did have an apparent re-occurrence of these symptoms on December 10, 1979, but Petitioner fails to mention that he was given an EKG and a cardiac enzyme test at that time by staff. None of the tests given indicated that he had any imminent heart related problems.

Mr. Roberts was admitted to the infirmary on December 11, 1979, for observation, and was examined by Dr. Kuzma. He was again given an EKG test which was found to be normal.[3] Dr. Kuzma's opinion from the examination and test results was that Mr. Roberts was not suffering from a life threatening heart related problem. Mr. Roberts was released from the infirmary on December 12, 1979, when his symptoms had abated.

Mr. Roberts did experience similar symptoms approximately one week later and was again examined at the clinic. The nurse practitioner performed a limited examination and concluded that the symptoms were similar to those exhibited on the two previous occasions. She decided, therefore, not to perform an EKG or other heart tests and did not consult with either Dr. Kuzma or any other available physician. Mr. Roberts returned to his cell and later died of a coronary arterial thrombosis on December 21, 1979.

Petitioner did not mention that all expert testimony at trial, including an expert presented by Petitioner, concluded that neither the medical staff nor Dr. Kuzma were negligent or committed any malpractice in their treatment of Mr. Roberts.[4] The prospect of this uncontroverted evi-

---

[3]Dr. Kuzma was misidentified by Petitioner as a "staff physician." He was actually a physician in private practice in Walla Walla who performed certain medical services on a periodic basis under a contract with the State.

[4]Testimony of *Dr. Hall,* (RP Vol. III, p. 73, line 2, p. 74, lines 15-18, p. 76, line 15-25; p. 77, lines 6-11); testimony of *Rosemary Pittman,* (RP Vol. III, p. 157, lines 4-16); testimony of *Dr. Levenson,* (RP Vol. III, p. 156, line 6 through p. 157, line 7); testimony of *Dr. Kuzma,* (RP Vol. II, p. 128, lines 9-14).

dence was undoubtedly the basis for dropping the medical malpractice claim immediately prior to trial.

Regarding the structure for delivery of medical services at the prison, Petitioner likewise has presented an incomplete picture. An understanding of this structure is essential to clarify some of Petitioner's misstatements regarding issues of compliance with the regulations. The institution was going through an evolution in the structure of its medical services delivery system at the time of Mr. Robert's treatment. Prior to 1979, the institution maintained a small staff of physicians and nurses on site, who attempted to provide a full range of services. Private or "downtown" physicians were only used in limited situations. The regulations in question were established in 1977 in the context of this type of delivery system. In 1979 the institution began a transition to a new delivery structure which provided for more extensive use of private physicians in the area. The prison reduced the number of staff physicians and contracted with a number of private or "downtown" physicians to come to the penitentiary on a periodic or scheduled basis to provide medical services. The prison also hired nurse practitioners in addition to the nursing staff to provide examination and treatment consistent with their training. Through this new program, the prison was able to use the services of a broader range of expert physician assistance. This broader range of physicians' services could also be utilized in a secure setting behind the walls.[5] In other words, the prison increased access to "downtown" physicians, but reduced the number of trips downtown. Dr. Kuzma was one of the contract physicians in this new medical service delivery system. He was a family practice specialist in private practice in the Walla Walla area.

It is against this general background that Petitioner at trial raised questions about compliance with the regula-

---

[5]Security was an important logistical problem to both the private physicians and the community.

tions. Petitioner contended the prison had not complied with the regulations in Mr. Robert's case. It was further suggested that prison officials had systematically denied access to supplemental care in all situations for all inmates.

There was considerable dispute at trial about whether the regulations in question had been complied with. More specifically the parties disagreed as to whether WAC 275-91-050 regarding "allied health professionals" applied to the new job of nurse practitioner. Petitioner contended that the nurse practitioner was not authorized to provide any form of treatment unless supervised by a physician. Defendant maintained that the regulation wasn't applicable to nurse practitioners. The parties also disagreed as to whether there had been an actual viable request for supplemental care, which had not been processed by staff. Petitioner contended that the evidence indicated a clear, unmistakeable request for care by a downtown physician over and above the medical care available at the time at the penitentiary. The evidence, however, was very ambiguous. Both Mr. Roberts and his mother orally requested to see a "downtown" physician. He actually did see a "downtown" physician, Dr. Kuzma, although the exam was at the penitentiary. Neither during nor after the exam by Dr. Kuzma, was there renewed request to see any other physician.[6] There was also no evidence that Mr. Roberts or anyone on his behalf independently contacted any local physicians to arrange supplemental care. As a result, the nurse practitioner, to whom the request had been made, simply assumed that Mr. Roberts had been requesting to see the contract physician, and that his request was satisfied when the doctor did see him. The defendants there-

---

[6]There is ambiguous testimony that on December 19 or 20, Mr. Roberts requested to see a downtown physician. The nurse practitioner made the decision that it was unnecessary to consult with any of the contract physicians. This decision was not considered negligent by any expert witnesses. See Fn. 4.

fore maintained that there was in effect compliance with the regulations.

Petitioner has also attempted to create the inference that the prison systematically denied access to supplemental care to any inmate during this time period. There was no evidence to support this allegation. Petitioner appears to be misrepresenting the available evidence to create this inference. The policy statement of April 24, 1979, which controlled the access to downtown visits for treatment in addition to that provided by the institution, must be read in the context of the revised structure. The prison was providing more access to "downtown" physicians at the penitentiary as part of its normal services. There was a reduced need to send inmates downtown for either primary or supplementary treatment. Furthermore, the policy itself did not preclude supplemental care, nor was it implemented in a manner that precluded such care. It is true, after this policy went into effect, there were no requests by inmates to have prearranged supplemental care. But, Petitioner's stated conclusion that "no inmates were allowed" to visit private physicians is completely unwarranted.

In fact, it is unfortunate that Petitioner has sought to get the Court's attention, not by the merits of their legal argument, but by incomplete facts and inappropriate conclusionary statements.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner is seeking to establish a new standard for prisoner medical care in the State of Washington. It is contended that prisoners have a liberty interest or right "to access to meaningful medical care." It is further contended that state officials may not deprive prisoners of this right without due process under the Fourteenth Amendment to the Constitution. The scope of this alleged right is exceedingly vague and ambiguous, but it appears to im-

pose on state officials a higher standard of care than the Eighth Amendment standard and the negligence standard under state tort law. The principal source of this alleged new right is two state regulations regarding medical care at prisons. (Appendix A). Petitioner claims that these regulations create enforceable individual rights under the standards outlined in *Olim*, and *Hewitt, supra.*

Petitioner also appears to suggest that *Estelle v. Gamble, supra,* itself should be modified to reflect this new right.

These contentions are without merit. There is no basis either in *Olim* or *Hewitt, supra,* or in *Estelle* for the creation of the alleged new right in the present situation. The clear standards outlined in *Olim* and *Hewitt, supra,* leave no doubt that the state regulations (Appendix A) do *not* create the type of individual rights or liberty interests necessary to establish a constitutional Due Process requirement. It also would be inappropriate for the Court to expand those standards to accommodate Petitioners' claimed right.

If the standards were stretched in this case, there would be a substantial expansion in the scope of state created "rights" subject to due process analysis in other contexts. This expansion would not only create a substantial burden on the states to accommodate such rights, but would substantially restrict state discretion. Such an expansion is completely unwarranted in this situation, especially where there are other adequate remedies available to prisoner. The Ninth Circuit Court of Appeals was correct in rejecting this contention.

In addition, there is no compelling need to modify *Estelle* to establish the new right sought by Petitioner. In the present case, Petitioner pursued both the Eighth Amendment and State Tort Claim remedies. The Eighth Amendment Claim was unsuccessful and the tort claims were dropped prior to trial. The recognition of the type of ambiguous right sought by Petitioner in addition to the other rights would substantially increase the duty of care by

prison officials. In fact, it approaches an almost strict liability standard. Petitioner seems to contend that the State should be liable in any situation, where in retrospect, additional treatment may have been beneficial, whether or not there has been any negligence. There is no compelling need to make this quantum leap in the duty of care. The standard in *Estelle* has consistently been recognized as an appropriate balance of respective interests. Furthermore, the availability of a malpractice remedy under tort laws ensures that the duty of care will be consistent with the standards applicable in the non-prison setting. The creation of this new right is therefore unnecessary and inappropriate, especially in a fact situation where the state officials have complied with the Eighth Amendment and have not been found negligent.

I

The Ninth Circuit Court of Appeals was correct in determining that the state regulations in question did not create independent, individual, liberty interests or rights.

Petitioner claims that the state regulations in Appendix A created the so-called right "to access to meaningful medical care." It was further alleged that Petitioner could not be deprived of this right without due process. Neither the District Court nor the Ninth Circuit Court of Appeals recognized this right, and Petitioner requests this Court to review that decision.

The Ninth Circuit Court of Appeals carefully followed the guidelines stated by this Court in *Olim* and *Hewitt, supra.* Those guidelines have been hammered out in a series of cases, including *Meachum v. Fano,* 427 U.S. 215 (1976); *Montanye v. Haymes,* 427 U.S. 236 (1976); *Connectucut Board of Pardons v. Dumschat,* 452 U.S. 458 (1981); *Vitek v. Jones,* 445 U.S. 480 (1980). Statutes and regulations which govern the day-to-day administration of

a prison system are not generally the type of provisions that create individual liberty interests or rights. Prison officials have been given considerable latitude and discretion in managing institutions.

In order to support a claim that the State has created an individual right or liberty interest, there must be a clear indication that the statutes and regulations place substantive limitations on official discretion. In other words, the provisions must establish particularized standards to limit state decisionmakers.

The opinion in *Hewit, supra,* emphasizes that the provisions must actually limit state discretion. The mere creation of procedural guidelines to channel official decisionmaking is insufficient without more to trigger the substantive protections of the Fourteenth Amendment.

The facts in both *Hewitt* and *Olim, supra,* illustrate this standard. *Hewitt* involved state statutes and a regulation which restricted the prison officials' ability to assign prisoners to administrative segregation. A prisoner could be placed in segregation only in specific situations and for limited time periods.[7] Prison officials did not therefore have unlimited discretion in assigning and retaining the prisoner in that status. The opinion in *Hewitt* emphasizes that the statutory language is unmistakeably mandatory in character, e.g., shall, must or will. See 459 U.S. 471. The Court ruled that the mandatory and limiting statutory language went beyond mere procedural guidelines and established the type of interest or right which triggers a due process analysis.[8]

In *Olim,* however, the Court found that the regulations did not limit the prison administrator's discretion. The inmate was challenging an administrative decision

---

[7]A hearing was required if any disciplinary action was to be taken; in no event could the restriction be more than ten days without a hearing.

[8]The Court went on to rule that the procedures contained therein satisfied due process requirements. See 459 U.S. 477.

transferring him from the Hawaii prison system to a California prison. The administrator's decision was part of a transfer process created by state regulations. The Court determined that the regulation did not confer a right on the prisoner to remain in the first prison to which he was assigned, defeasible only upon proof of specific acts of misconduct. The State retained the discretion to transfer for any reason. There were no conditions or limits imposed on the discretionary power. Under these circumstances, Hawaii did not create an individual liberty interest protectable under the Due Process Clause.

The standards in *Olim* and *Hewitt* do not constitute a new direction, but are simply the most recent application of what has been a consistent standard. See for instance, *Connecticut Board of Pardons v. Dumschat, supra;*[9] *Meachum v. Fano, supra; Montanye v. Haymes, supra;*[10] *Greenholtz v. Nebraska Penal Inmates;* 442 U.S. 1 (1979);[11] *Vitek v. Jones, supra;*[12]

The Ninth Circuit Court of Appeals correctly applied the standard in this case. The regulations in question do not purport to create a right, nor do they limit the exercise of state discretion. The regulation regarding the supplemental medical care creates an opportunity to receive supplemental care rather than a right. The language is not

---

[9]State statutes authorizing the State Board of Pardons to commute life sentences did not create a right or expectation of commutation. The statute at most created an opportunity to appeal for clemency, and state discretion was not limited.

[10]In both *Meachum* and *Montayne*, it was determined that the state statutes did not confer a right to remain in a particular institution, defeasible only upon specific acts of misconduct. The discretion of prison officials was also not limited by these statutes.

[11]Statutes establishing a system of parole did create a liberty interest. The statutes created a specific right or expectation to parole that could not be denied unless there was a specific determination that certain conditions were applicable.

[12]Under Nebraska statutes, prisoners could not be transferred to a mental hospital unless there was a specific determination that a person was mentally ill. State discretion was therefore limited.

mandatory. Compare *Hewitt*. The provision also does not limit state discretion in any way. Similarly, the regulation regarding supervision is not mandatory and does not limit state discretion. See *Greenholtz, Olim, Meachum, Montayne, supra.*

The Ninth Circuit Decision was consistent with the disposition of this issue in other Ninth Circuit cases and in other circuits. See, for instance, *Sproytte v. Walters,* 753 F.2d 498 (6th Cir. 1985); *Baumann v. Arizona Dept. of Corrections,* 754 F2d 841, 844 (9th Cir. 1985); *McFarland v. Cassady,* 779 F.2d 1426 (9th Cir. 1986).

In conclusion, the Ninth Circuit applied the standards outlined by this Court in precisely the manner intended. Unless this Court believes that a new direction should be established, the petition should be denied.

II

The Court Should Not Expand The Standards in *Olim* and *Hewitt* To Create The Type of Right Sought To Be Established

In order to establish the type of right that would trigger a Due Process analysis, this Court would have to substantially expand the standards outlined in *Olim* and *Hewitt, supra.* In effect, the Court would have to overrule that entire line of cases. See P. 9.

This would reflect a major change in direction and would have substantial implications in other areas. If these regulations create enforceable individual rights, there is an almost infinite range of other discretionary statutes and regulations of governmental agencies that would also qualify. This would create a substantial burden on governmental entities to accommodate these rights consistent with the dictates of the Fourteenth Amendment, and would substantially restrict state discretion. This type of major change is unwarranted, especially in a fact situation where state officials have complied with two previously existing duties of care.

What is equally troubling about Petitioners' contention is how a 14th Amendment Due Process analysis would be applicable to this alleged right. A right "to access to meaningful medical care" is exceedingly vague and ambiguous. Even Petitioners' attempt to apply their right to the limited context of this case does little to describe the scope of the right with any clarity. Is it a right to treatment by a physician of choice unless such treatment would be in conflict with prescribed treatment? Is it a right to referral to a specialist where any type of heart problem is a possibility? Is it a right to a second opinion in any situation where there is a possibility of life threatening consequences? Or is it simply a right to have requests for supplemental treatment reviewed in a timely manner by physicians?

Whatever the intended scope of the right, it is clear that Petitioner believes the standard of care to be greater than a simple negligence standard under state tort law. In other words, this standard would be applicable even when state officials comply with the tort standard as occurred in this case.[13]

What is even more troubling is how the Fourteenth Amendment Due Process requirement would be applicable to this right. Must the State have a formalized process? Should standards for decision be more clear and specific? Should there be a hearing process or right of appeal?

These questions show the absurdity of attempting to superimpose a due process analysis on regulations that were not intended to create individual rights or expectation. Those regulations were enacted to authorize the Department to approve supplemental medical examination

---

[13]Under Petitioners' approach, *Parat v. Taylor*, 451 U.S. 527 (1981), would apparently not be dispositive. In *Parat*, this Court held that Nebraska's tort claim remedy was sufficient due process for alleged negligent acts. *Parat* was modified in *Daniels v. Williams*, ___ U.S. ___, Slip Opinion 54 USLW 4095 (1986) and *Davidson v. Cannon*, ___ U.S. ___, Slip Opinion 54 USLW 4090 (1986), wherein it was determined that simple negligence is not the kind of abusive governmental action the 14th Amendment was intended to protect against.

and treatment in its discretion. They were not intended to create a right upon demand or limit the institution's range of options. This Court should not modify the standards in *Olim* and *Hewitt, supra,* to establish the right sought by Petitioner.

III

There is no need to accept review of this case in order to "clarify" *Estelle v. Gamble.*

Petitioner seems to suggest that the standard in *Estelle, supra,* should be modified to reflect this new right sought to be established. It is implied that the proposed standard is actually being applied by courts in a manner that recognizes this new right, citing *Hoptowit v. Ray,* 682 F.2d 1237 (9th Cir. 1980). In the alternative, it is suggested that it is necessary to substitute the higher standard of care contemplated by their alleged right, for the Eighth Amendment standard established in *Estelle, supra.*[14]

None of the recent opinions of this Court even remotely suggest that the type of vague and ambiguous standard should be established as the proper measure of Eighth Amendment constitutional rights.

This Court has consistently reaffirmed the holding in *Estelle* that the proper standard for Eighth Amendment adequacy of medical treatment claim is "deliberate indifference to serious medical needs." Ordinary lack of due care is insufficient. Cite *Whitley v. Albers,* 475 U.S. ___ (1986) Slip Opinion 54 USLW 4236; *Spaziano v. Florida,* 468 U.S. 447 (1984); *Daniels v. Williams,* 474 U.S. ___

[14]Petitioner apparently also has the mistaken belief that the Ninth Circuit ruled that the *Estelle* standard applies, whether or not the State has created through its statutes and regulations a liberty interest. The Court actually ruled that there is no right to "supplemental" care under the *Estelle* standard standing alone. Unless it could be established that the State had created rights under its statutes or regulations under the standards outlined in *Olim* and *Hewitt,* the *Estelle* standard was applicable.

(1986) Slip Opinion 54 USLW 4095; *Davidson v. Cannon*, 474 U.S. ___ (1986) Slip Opinion 54 USLW 4090. There is no indication in any of these opinions that the existing standard is insufficient for adequate protection of prisoners interests. There is also no hint that it would be beneficial or desirable to adopt the type of right outlined by Petitioner.

The *Estelle* standard is dynamic in the sense that it considers "contemporary values and evolving standards of decency" within the context of medical care *Spaziano v. Florida, supra.* In *Whitley v. Albers, supra,* this Court distinguished the Eighth Amendment standard for medical care from the standard applicable to quelling riots. The Court emphasized that the Eighth Amendment proscription against cruel and unusual punishment should be applied in a manner that reflects the differences in the kinds of responsibilities or conduct in the management of a prison. The deliberate indifference standard was appropriate for medical care because medical needs do not ordinarily clash with other governmental responsibilities. It is not, however, applicable to activities taken to quell prison riots.[15] The opinion in *Whitley v. Albers, supra,* along with the other recent opinions cited indicate that this Court is not ready to junk the standard of *Estelle* in favor of the vague right claimed by Petitioner.

---

[15] *Whitley v. Albers, supra,* also deals with another contention Petitioner seems to raise. Petitioner seems to suggest that there is a free standing Fourteenth Amendment liberty right or interest regardless of whether a right is created under state regulations. The inference is that there is a different standard from that contained in *Estelle.* The Court states that the standard for such a right if analytically it did exist, is the equivalent of the Eighth Amendment standard.

CONCLUSION

Petitioners' request that this Court review the Ninth Circuit Court of Appeals opinion and create a right "to access to meaningful medical care" should be denied. The state regulations in question do not under current standards create such a right, and there is no compelling reason to modify these standards. In addition, it is neither necessary nor appropriate to modify *Estelle v. Gamble, supra,* to reflect this vague and ambiguous right. The existing standard along with the tort claim remedy that was pursued but dropped prior to trial, are sufficient to protect the inmates' interest in appropriate medical care. The Petition should be denied.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

TIMOTHY R. MALONE
Assistant Attorney General

DAVID E. WALSH
Deputy Attorney General

Attorneys for Respondent
State of Washington

DATED: October 10, 1986

APPENDIX A

State of Washington Administrative Code:

WAC 275-91-011 Medical/dental care—GENERAL POLICY. The policy of the Department of Social and Health Services with regard to medical and dental care for inmates of adult correctional institutions is to provide, at a minimum, a degree of care which is designed to reasonably respond to an inmate's serious medical and dental needs. The considerations of proper medical/dental procedure, time and available resources are material in defining what is a reasonable response in any particular situation. More than the minimum level of care may be provided when such additional care comports with proper medical practice and is reasonably affordable from the department's resources. Serious medical needs are those which, if not responded to, will

(1) Cause or allow to continue significant or debilitating pain; or

(2) Cause significant deterioration of the inmate's medical condition during the period of his incarceration [Order 1252, § 75-91-001, filed 11/21/77.]

WAC 275-91-050—USE OF ALLIED HEALTH PROFESSIONALS. Allied health professionals may be used in the medical and dental health programs at each institution. When operating under the supervision of a licensed physician or dentist, an allied health professional may conduct initial screening, treat minor illnesses, and do related tasks. [Order 1252, § 275-91-050, filed 11/21/77.]

WAC 275-91-070—SUPPLEMENTAL CARE. Any inmate may, at his or her own expense, obtain medical or dental care additional to that mandated by the provisions of this chapter: *Provided*, That a doctor or dentist in the department's employ certifies that the proposal for supplemental treatment comports with sound medical or dental practice. The time and place of the performance of the supplemental care are subject to the convenience of the prison's custody staff. [Order 1252, § 275-91-070, filed 11/21/77.]